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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 365

THE ASSOCIATED PRESS, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF FOR AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE

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BRIEF FOR AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE

This brief is filed in the above entitled case by the American Newspaper Publishers Association as amicus curiae.

Statement of the Case

The Associated Press petitioned for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit, rendered July 13, 1936, in National Labor Relations Board v. The Associated Press, 85 F. (2d) 56, granting the petition of the National Labor Relations Board for enforcement of an order entered by the Board on May 21, 1936, requiring The Associated Press to:

"1. Cease and desist:

"(a) From discouraging membership in the American Newspaper Guild or in any other labor organization of its employees, by discharging, threatening to discharge, or refusing to reinstate any of its employees, for joining the Guild or any other labor organization of its employees; and

"(b) From in any other manner discriminating against any of its employees in regard to hire or tenure of employment or any term or condition of employment for joining the Guild or any other labor organization of its employees; and

"(c) From in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

"(a) Offer to Morris Watson immediate and full reinstatement, to his former position, without prejudice to any rights and privileges previously enjoyed by him.

"(b) Make whole said Morris Watson for any loss of pay he has suffered by reason of his discharge, by payment to him of a sum of money equal to that which he would normally have earned from the date of his discharge to the date of offer of reinstatement, computed at the rate of $295 per month, less the amount earned by him in that period.

"(c) Post immediately notices to its employees in its New York office stating (1) that respondent will cease and desist in the manner aforesaid, and (2) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting." (R. 3.)

The Associated Press is a membership corporation organized and existing under the laws of the State of New York. It is engaged in the purchase, collection, receipt, compilation and formulation of intelligence. Its membership includes the owners of over 1,300 daily newspapers in the United States to whom the Association distributes such news as it collects.

On October 18, 1935, the petitioner discharged Morris Watson, an editorial employee, engaged in obtaining, composing, writing and editing items of news.

On November 7, 1935, the American Newspaper Guild, a labor organization, filed charges with the National Labor Relations Board against The Associated Press, alleging that in discharging Watson the petitioner had engaged in unfair labor practices in contravention of Section 8 of the National Labor Relations Act (R. 10-11). Thereupon, on December 4, 1935, a complaint was served by said Board on the petitioner herein, which alleged that in violation of Sections 8(1) and (3) of the National Labor Relations Act it had discharged and refused to reinstate said Watson (R. 12-15). The Associated Press by answer admitted the discharge of Watson but denied that the discharge was due to the fact that Watson had joined and assisted the Guild or engaged in labor activities (R. 16-21). Hearings on the complaint were held before an Examiner. The petitioner herein moved to dismiss the complaint on constitutional grounds. Its motion was denied and it withdrew. After further hearings, the Examiner recommended reinstatement of Watson and payment of lost wages (R. 416-432). This report was confirmed by the Board and an order entered to that effect (R. 432-433). The Board then petitioned the Circuit Court of Appeals for the Second Circuit for the enforcement of this order (R. 14). After a hearing before that court on June 15, 1936, at which the application of the Act to the petitioner and its constitutionality were fully argued, that court granted the petition of the Board (R. 445).

From this decree The Associated Press applied to the Supreme Court of the United States for a writ of certiorari and its petition was granted by this Court on October 26, 1936. The Associated Press v. National Labor Relations Board, 57 Sup. Ct. 110.

Interest of the Amicus Curiae

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. The particular object of the Association is to foster the business and business interests of its members. It has a membership of more than 425 newspaper publishers whose publications represent in excess of 80% of the total daily and Sunday circulation of newspapers published in the United States. Many of its members are also members of The Associated Press. Some of them are wholly dependent upon The Associated Press for news of national and international affairs. Some, in addition to being members of The Associated Press, obtain the news services of other press associations. Others are not members of The Associated Press. All are vitally interested in the question presented by this controversy insofar as it affects the business of the press of the United States.

Question Presented

The fundamental issue in this case, insofar as it concerns the newspaper publishing business, is whether Congress can create or endow a legislative agency with power to control the various steps and operations essential to the gathering and dissemination of information by the press.

Statutes and Constitutional Provisions Involved

The statute involved is so lengthy that for convenience it is included in Appendix A of this brief.

The statute is the National Labor Relations Act, Pub. No. 198, 74th Congress, 49 Stat. 449, U.S.C.A. Title 29, Section 151 et seq. A brief summary of the more pertinent provisions of the statute follows:

Section 7 of the Act provides that

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 8 of the Act defines five unfair labor practices. All five are practices by employers. The five unfair labor practices applying to employers only, as set forth in this section are:

> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> "(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it;
>
> "(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . .
>
> "(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
>
> "(5) To refuse to bargain collectively with the representatives of his employees . . ."

Section 9 of the Act deals with the selection of representatives of the employees and their election as representatives.

Section 9(a) makes a majority of the employees "in a unit appropriate for such purposes" the "exclusive representatives of all the employees in such unit for the purposes of collective bargaining."

Section 9(b) vests the Board with power to determine what is the appropriate unit for purposes of collective

bargaining—whether it shall be the employer unit, the craft unit, the plant unit or subdivision thereof.

Section 9(c) vests the Board with power to investigate any controversy affecting commerce, to hold hearings upon such controversies after due notice, and to take a secret ballot of employees, or utilize any other method it desires to determine who are the representatives of the employees.

Section 10 empowers the Board to issue orders to employers to cease and desist from the unfair practices enumerated in Section 8. This section also contains certain procedural provisions pertaining not only to procedure before the Board but to procedure in the courts.

Section 11 gives the Board unlimited investigatory power, including the right to compel the employer to produce his books, records, and other private papers and effects, including correspondence, upon request of the Board, and without particularization.

Section 12 contains criminal penalties of fine and imprisonment—the fine not to exceed $5,000, and the imprisonment not to exceed one year—for employers who refuse to carry out the orders of the Board.

The constitutional provisions involved are the First, Fourth and the Fifth Amendments to the Constitution of the United States.

The First Amendment is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment is as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

ARGUMENT

I.

THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITS CONGRESS FROM ABRIDGING THE FREEDOM OF THE PRESS OR FETTERING THE ESSENTIAL PROCESSES IN THE PRODUCTION OF A NEWSPAPER. SINCE CONGRESS HAS NO SUCH POWER, IT HAS NONE TO DELEGATE TO ANY LEGISLATIVE AGENCY.

A. The predominant purpose of the grant of immunity in the First Amendment was to preserve an untrammeled press as a vital source of public information.

The function of the daily newspaper press is the gathering and dissemination of information. The information may be in the form of news, editorial comment or advertising. It may be in word or picture form.

The function of a press association is the gathering of information, its formulation into news, and its dissemination to newspapers for publication in their columns. Essentially this service of a press association is one of the functions of the press, for no matter how large or how economically strong any particular newspaper may be, there is not a newspaper in the United States today with sufficient resources to give its readers the worldwide coverage of news now supplied by our press associations.[1]

News is gathered at the four corners of the earth and transmitted by every known agency of communication—by word of mouth, by telephone, telegraph, cable, wireless, post office, and airplane—so that it may be published for the information of newspaper readers.

News is information of general public interest which the newspaper proprietor regards as of sufficient importance to publish in his newspaper. The ultimate responsibility for its publication is solely his. He may delegate this responsibility to his editor—in fact, such is usually the case—but where the editor is responsible to the publisher, the latter in turn is responsible to the public. News is factual. Therefore, those who gather the news are under obligation to their publishers to make it so, and without bias or partisan color. Affiliation of newspaper reporters or editorial

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[1] There are in the United States four great organizations gathering and disseminating information in the form of news. They are, in addition to petitioner herein, the International News Service, the Universal Service, and the United Press. These organizations are unique in that they, unlike the press associations in all other countries, are not and never have been in any way subject to governmental control, censorship or domination of their internal affairs. Nor has any one of them ever been the recipient, directly or indirectly, of any financial aid or support from the government or under any economic obligation to the government. In 1935, petitioner herein spent in excess of $9,360,000 in its service to the press. (R. 30.) A safe estimate of the cost of the service by all four great American press associations would be a figure in excess of $20,000,000 annually.

It is important to bear in mind the nature of the Associated Press. It is a mutual press association, engaged in the business of gathering information for its members, all of whom furnish news to this organization for the benefit of one another. The three other organizations are not mutually, but privately owned. Even so their function is the gathering of information, its formulation into news and its dissemination to newspapers.

writers with an organization which can demand or command adherence to and support of any particular program affecting broad public interest or assistance to one party or another in a controversy cannot be countenanced by a publisher who desires to preserve the integrity of his news columns.[2]

This Court, within recent years, has had occasion to consider the purpose of the grant of immunity against abridgement of the freedom of the press as contained in the First Amendment to the Constitution of the United States.

In *Near v. Minnesota*, 283 U. S. 697 (1931), the Court referred to a statement by Mr. Madison, who said:

> "The great and essential rights of the people are secured against legislative as well as executive ambition. They are secured not by laws paramount to prerogative but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from *previous restraint by the executive, as in Great Britain, but from legislative restraint also.*" Report on the Virginia Resolutions, Madison's Works, Vol. 4, p. 543. (Emphasis supplied.)

The Near case involved an effort by a legislature to provide for the suppression of the press by injunctive process.

In *Grosjean v. American Press, Inc., et al.*, 297 U. S. 233

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[2] It is significant that the American Newspaper Guild, which filed the complaint in this proceeding, at its last annual convention pledged its support to a Farmer-Labor political party. Opposition to this commitment has been expressed by various members of the Guild. (See The Guild Reporter, official organ of the American Newspaper Guild, November 1, 1936, p. 6.)

The Guild also has affiliated itself with the American Federation of Labor. Following the Guild's vote of affiliation, the California State Federation of Labor, at its 1936 convention, voted to bar non-Guild photographers from its meeting and to deny non-Guild reporters seats at the press table at future meetings of the Federation. (See Editor and Publisher, September 26, 1936, p. 14.)

Article III, Section 20, of the Constitution of the Newspaper Guild of New York, obligates each applicant for membership in the Guild to bind himself to the fullest observance of the "letter and spirit of the Constitution of the A.N.G. and of the Guild and to declare his willingness to conform to the rules and regulations now in force or hereinafter adopted." (R. 353.)

(1936), this Court passed upon an effort by a legislature to restrain the press through taxation, and in holding the law repugnant to the constitutional guaranty, through Mr. Justice Sutherland, said:

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . .
>
> "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In *De Jonge v. Oregon*, Supreme Court of the United States No. 123, decided January 4, 1937, this Court again dealt with the grant of immunity in the First Amendment and Mr. Chief Justice Hughes, speaking for a unanimous Court, said:

> "Freedom of speech *and of the press* are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. (Citing among other cases Near v. Minnesota, supra; Grosjean v. American Press Co., supra.) . . . The First Amendment of the Federal Constitution expressly guarantees that right against abridgement by Congress . . . For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause . . .
>
> "These rights may be abused by using speech or press or assembly in order to incite to violence and

crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, *free press,* and free assembly *in order to maintain the opportunity for free political discussion,* to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." (Emphasis supplied.)

B. The National Labor Relations Act, as applied to the instant case, destroys the principle of a free press as guaranteed by the First Amendment.

Morris Watson was a reporter employed by The Associated Press, petitioner in the instant case. His work consisted of gathering, writing and editing news. This work was but a stage in the preparation of news for publication. Before it reached the reading public in A. P. newspapers, it had to be approved by Watson's superiors, corrected if they thought advisable, and then transmitted over "leased" wires to member papers. There it might be printed in full, condensed, or rejected in toto. But before being printed, it had to be approved by the editor. In addition, appropriate heads had to be written. Then and not until then could the final steps towards publication be taken. These include the setting of the news in type, its assignment to a particular page in the newspaper using it, its inclusion in the form for that page, the casting of that form in the stereotyping room for use on the presses, the placing of the cast on the presses, the assembling of all other pages going into that newspaper and their preparation for press runs; and when this had been done, the actual operation of the presses themselves.

Watson joined the American Newspaper Guild and became active in its affairs in 1933.

On October 18, 1935, he was discharged. Thereupon, the Guild filed a complaint with the National Labor Relations Board alleging his discharge was due to his Guild activities and charging a violation of the Act by petitioner. The Board held a hearing, after which it found that he was discharged because of his Guild activities and it ordered The Associated Press to reinstate him. (R. 3.) The Associated Press refused. Whereupon, the Board petitioned the Circuit Court of Appeals for the Second Circuit for the enforcement of its order. After hearing and argument, that Court granted the petition of the Board. National Labor Relations Board v. The Associated Press, *supra*.

Even if the Board correctly found that Watson was discharged because of his Guild activities, it is the belief of this amicus curiae that the Board is without constitutional power to order his reinstatement and compel compliance with that order. Rather, it believes that when, in the judgment of a publisher, a newswriter or editor, by reason of external affiliations, influences or activities becomes unsuited for his employment, no agency of the government either has the power or can be endowed with the power by Congress to interfere with the exercise of that judgment, whatever the nature of the employee's affiliations or activities may be.

A newspaper publisher is responsible, under the Constitution and laws of this country, for the contents of his publication and for the policies as expressed in his publication. He cannot be restrained in the conduct of his publication, even though he is subject to subsequent punishment for abuse of his responsibility or violation of law. *Near* v. *Minnesota, supra*. A publisher cannot divest himself of this responsibility even though by his own action he may limit the exercise of his judgment and surrender control of his policies to persons or organizations who are not responsible to the general public.

By the precise terms of the First Amendment, as interpreted by this Court, Congress is without power to interfere with him in the exercise of his judgment or the meeting of his responsibility.

If such power does exist, then the responsibility for the gathering and dissemination of information has been transferred from the press to the government and the press has become a creature of the government.

If such power exists, then the press is no longer untrammeled, no longer a vital source of public information.

The Act here in controversy purports to clothe the National Labor Relations Board with such power.

Under the sweeping provisions of Section 7, employees are given the right of self-organization to bargain collectively through representatives of their own choosing and to engage in concerted activities, not only for the purpose of collective bargaining but for other and undefined purposes as well. There is no limitation upon the activities.[3]

They may organize to destroy their employer[4]; to tear down the government; to support the government; to aid a

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[3] In 1936, the Post-Intelligencer, the oldest daily newspaper in the City of Seattle, Washington, was forced to close down for a period of months because of such activities. Two members of the Guild were discharged. At the time of their discharge, the Guild had a membership of less than 30 out of a total of approximately 80 editorial workers employed by the Post-Intelligencer. The Guild filed charges with the National Labor Relations Board. Then it ordered a strike before the Board could hear its complaint. Aligning itself with other labor groups whose members were not employed by the newspaper, the Guild picketed the Post-Intelligencer plant. Members of the printing trades unions employed by the newspaper refused to cooperate with the Guild in these strike activities. To avoid further bloodshed after riotous activities, the publisher suspended publication. While the paper was suspended, the National Labor Relations Board proceeded to hear the Guild's complaint. During the course of the hearing, the member of the Board who was designated to conduct it ruled that the Board was not concerned in any of the Guild's activities, but solely in the one question as to whether the two Guild members had been discharged because of their Guild activities. (See *National Labor Relations Board in the matter of William Randolph Hearst, et al., and American Newspaper Guild*, Case C-136.)

[4] The record in the Post-Intelligencer case shows that long before any employee of that newspaper joined the Guild, the American Newspaper Guild was engaged in a nationwide boycott against all of the enterprises of the Post-Intelligencer's owner. (P. 152 Record in *National Labor Relations Board in the matter of William Randolph Hearst, et al., and American Newspaper Guild*, Case C-136); that the member of the Board

political party or to oppose it; to indulge in national or international controversy; to control the sources and flow of information; to influence public opinion.

And if the employer objects to, or if he discharges employees engaged in, such activities, under Section 8 of the Act he is guilty of "unfair labor practices". If he refuses to bargain with a group of his employees so engaged, he is equally guilty.

Section 9 of the Act sweeps away at one stroke the whole American principle of a press free from governmental dictate.

Under Section 9(a), all rights of an individual employee to bargain for himself are destroyed. If a bare majority of his fellow workers select representatives, he is bound by their program. True, he can submit a grievance to his employer, but the latter is powerless to act if his action interferes in any manner with the dictates of the majority group.

Section 9(b) vests the National Labor Relations Board with the power to determine what is the appropriate unit for purposes of collective bargaining, whether it shall be the employer unit, the craft unit, the plant unit or subdivision thereof. None of these units is defined with particularity.

There is no limit to the Board's discretion under this section. No standard is fixed for its guidance.

It is entirely within the discretion of the Board to order an election to determine who shall, for purposes of collective bargaining, represent the employees of

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presiding at the hearing stated the Act did not go to unfair acts of the employees. (P. 155 Record in *National Labor Relations Board in the matter of William Randolph Hearst, et al., and American Newspaper Guild*, Case C-136). The Guild Reporter, official organ of the American Newspaper Guild, on May 15, 1936, at page 3, contained a two column box urging Guild members and Guild friends to (a) withhold their patronage from "as many Hearst enterprises as possible"; (b) conduct "your own private campaign on some of his advertisers", and (c) write to advertisers telling "what you are doing". Twenty-six newspapers, eleven magazines, and twelve radio and motion picture enterprises were listed specifically to be boycotted. At that time there was a dispute pending on one newspaper only out of all of these listed companies and the single issue was over signing a Guild contract.

(a) a particular department of a single newspaper;

(b) that particular department of two or more newspapers in a given city or that department of all newspapers in any city or area or even in the country as a whole;

(c) a single newspaper as a unit of employment, without reference to the character or the nature of the work done by any group of employees; or of all newspapers in any city, or area, or of all newspapers in the United States.[5]

Once the Board certifies the representatives, after such a determination as it may have made pursuant to the provisions of Section 9(c), the law requires the employer to deal with those representatives and only with them insofar as all conditions of employment in his newspaper or press association are concerned. Those representatives may insist that the employer employ only members of their organization; that the employer shall compel all of his employees who do not at the time of their negotiations belong to that particular organization to take out membership therein under penalty of discharge if they decline; that the employer agree to confine his selection of future employees to members of the organization and to make his selection from lists furnished by the organization; and further, that

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[5] While Section 9(a) makes a majority of the employees in a unit "appropriate for such purposes" the "exclusive representatives of all the employees in such unit for the purposes of collective bargaining", the National Labor Relations Board, where it orders an election, interprets and enforces this section to mean not a majority of the employees but a majority of those employees who vote in such an election.

In another controversy between the petitioner herein and the American Newspaper Guild, the Guild petitioned the Board to hold an election to determine the representatives of petitioner's employees for purposes of collective bargaining. The Guild, in its petition, stated that it represented a majority of the petitioner's employees. An election was ordered. Many of petitioner's employees purposely or otherwise refrained from voting. The Guild polled a majority of those who did vote, but this did not constitute a "majority of the employees." However, the Board certified the Guild as the representative of all of the employees and ordered the petitioner to enter into collective bargaining with it. (See *National Labor Relations Board in the matter of The Associated Press, a corporation, and the American Newspaper Guild*, Case R-36.)

One of the avowed purposes of the American Newspaper Guild, as stated in its constitution, is to promote "industrial unionism" in the newspaper business. (R. 884.)

the employer refuse to employ anyone who has been expelled or rejected from membership in that organization.[6]

These possibilities are not fantastic. They are included in the program of the American Newspaper Guild which filed the complaint against the petitioner in this case precipitating this controversy before the National Labor Relations Board.

Section 9(d) provides for the carrying out of the Board's orders. While this section contains a provision for judicial review, nevertheless, this provision is limited by Section 10(e), which makes the findings of the Board as to the facts, if supported by evidence, conclusive. Judicial review is further limited by Section 10(b), which in precise language provides that in proceedings before the Board "the rules of evidence prevailing in courts of law or equity shall not be controlling."

From the foregoing, it can thus clearly be seen that the provisions of this Act purport to strip the press of all con-

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[6] Jacob Mogelever, city editor of the Newark, New Jersey, Ledger, was expelled from the Guild in December, 1936, on the ground that his "interests lay more with the employer than with the employees." On January 13, 1937, Vice Chancellor Bigelow issued a temporary restraining order restraining the Newark Newspaper Guild from removing Mogelever's name from its rolls and from certifying his expulsion to the American Newspaper Guild. In his petition to the Court, Mogelever declared his loss of membership might deprive him of the right to make a living as a newspaper man. As a member of the Guild, Mogelever opposed the declaration of a strike against the Ledger some months ago, but when the strike was voted he served on the picket line for 19 weeks and was, for a time, chairman of the welfare committee of the strikers. He insists there is no room now in the Guild for anyone opposing the policies of the majority therein. (See *Editor and Publisher*, January 16, 1937, p. 8.)

A standard form of contract submitted to newspapers by the American Newspaper Guild contains the following provisions:

> "All conditions and benefits contained in this contract extend over all editorial employees of the publisher."
>
> "The publisher agrees, however, to employ in his editorial department only members in good standing of the Guild."
>
> "In case the publisher wishes to hire employees in the editorial department, he shall request the Guild to furnish lists of its members available for such employment. Such lists shall be furnished within 48 hours. If the Guild fails to furnish such lists or if such lists do not contain the names of persons acceptable to the publisher, the publisher may hire anyone whether a Guild member or otherwise. Employees so hired shall, within 30 days from the date of employment, become members of the Guild or be dismissed by employer."

trol over conditions of employment in the conduct of its business of gathering and disseminating information. In the final analysis, that control is vested in a governmental agency. Such a governmental control is repugnant to the First Amendment to the Constitution of the United States.

II.

THE NATIONAL LABOR RELATIONS ACT IS REPUGNANT TO THE FIFTH AMENDMENT TO THE CONSTITUTION.

A. The law here in controversy abolishes the right of an individual to contract for his own services.

One of the most cherished rights of an American citizen is that right guaranteed by the Fifth Amendment to the Constitution to make contracts for his own services. As this Court said in *Coppage* v. *Kansas*, 236 U. S. 1 (1915):

> "If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist; to the poor as to the rich; . . ."

Under Section 9(a) of the Act, if a bare majority of one's fellow workers in any unit selected by the National Labor Relations Board as an appropriate unit for purposes of collective bargaining lays down a program, that person is compelled not only to subscribe thereto but to submit thereto as long as he is in the minority. His only alternative is to give up his employment.

The effect of this section on a newspaper worker can readily be seen if one pauses for a moment to consider that the fundamental essential of reportorial and editorial work is quality. The prestige and success of a newspaper and its service and value to the public depend not on how much

copy is produced, but on how good, how true, how independent, how uninfluenced by external influences or affiliations that copy is.

And the value of a newspaperman's services depends not on any standard arbitrarily set up on a quantitative basis, but on the higher standard of individual quality. To deprive him of the right to sell his services to his own best advantage, to compel him to sell them at a figure fixed by a majority of his fellow employees, is to deprive him of his right to make contracts about his own affairs as now guaranteed by the due process clause.[7]

Morehead v. *Tipaldo*, 298 U. S. 587 (1936).

Carter v. *Carter Coal Company*, 298 U. S. 238 (1936).

Schechter Poultry Corp. v. *United States*, 295 U. S. 495 (1935).

Railroad Retirement Board v. *Alton Ry. Co.*, 295 U. S. 330 (1935).

Adair v. *United States*, 208 U. S. 161 (1908).

B. The Act deprives the employer of the right to make contracts about his affairs.

Just as the Act deprives the employee from making contracts for his services to his own best advantage, so does it deprive the employer of the right to contract for services to his own best advantage.

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[7] This amicus curiae was probably the first great national organization of employers to enter into arbitration contracts with the American Federation of Labor covering mechanical employees. This it did more than 35 years ago. However, a distinction must be drawn between the work of mechanical employees and that performed by editorial employees. Mechanical employees follow a pattern. The value of their output is on a tangible, measurable basis of quantity. Quality is in general uniform. Compensation can be based on the elements of time and quantity. The agreements entered into between publishers and groups of their mechanical employees have been voluntary, not subject to government compulsion. A few publishers have entered into agreements with their editorial employees. This action also was voluntary and entirely within the proper exercise of their judgment by such publishers.

The issue here presented goes far beyond such voluntary action. It is whether Congress has power to compel those who are engaged in the business of the press to become subject to the dictates of a legislative agency in such a manner as to restrict the free exercise of judgment by all publishers and thereby fetter the press.

The value and effectiveness of newspaper copy, and hence the value and effectiveness of the services of reporters and editors who write it, depend upon such qualities as personality, ambition, imagination, creative ability, independence of mind and diverse and special intellectual talent. These qualities are exclusively individualistic, not subject to classification, regimentation or standardization.

These individual talents, though not always clearly definable, are nevertheless discernible to the publisher or editor, who must have reporters and editorial writers who as a group constitute a staff of balanced excellence and talents and who as individuals are creative, independent and both able and free to see, narrate and criticize and who, above all, are chosen on merit and without regard to external affiliations or influences.

For any external organization or tribunal, regardless of origin, method or intention, to participate in control of news or editorial staffs through the processes of selection, determining tenure or requiring restoration to employment of staff members, or by any other means which ingenuity may contrive, is directly to exercise an influence in the determination of what shall be written, what shall be printed, who shall write it and how it shall be written, and edited. For a publisher or editor to permit such participation, in whatever form of direction or indirection it may be advanced, is a deprivation or surrender of that which is at once the duty, the responsibility and the right of that publisher or editor, namely, to determine the character of the newspaper.

Such a surrender or deprivation is impossible for any newspaper that stands for intellectual freedom for its news and editorial staffs and for an independent press.

A publisher cannot meet his responsibility if by government fiat he is compelled to accede to the demands of any group of employees that employment in his editorial and news departments shall be restricted to any list of membership chosen by such an organization or group or that com-

pensation for work done in these departments shall be based upon any rule of uniformity, irrespective of quality, whatever the yardstick may be.

A statute, such as the one here in controversy, deprives the publisher of the right to determine the character of his newspaper in a manner repugnant to the First Amendment. Also, it deprives him of his right to make contracts about his affairs in a manner repugnant to the Fifth Amendment.

C. The statute contains no mutuality.

Nowhere in the statute is an employer given any rights whatsoever, except the right to resist the Board when the latter seeks an order of the Court to enforce its dictates or to petition for a judicial review of a Board order. By the limitations of the statute, this right of judicial review virtually is limited to questions of law, as findings of fact by the Board are conclusive. Preponderance of the evidence to justify a finding is not required. And rules of evidence specifically are waived.

The only unfair labor practices are those set forth in Section 8. They are solely practices of employers.

Under the theory of the law, a majority of an employer's employees can do no wrong, once the Board has certified them as the representatives of all employees.

While the representatives of such a majority may complain against the employer, he may not complain against them.

While the Board is vested with power to enter an order against an employer, it is without power to enter one against his employees.

And all rights of an individual employee who does not subscribe to the program of a majority of his fellow employees are ignored. True, the individual may submit grievances to his employer but the latter is powerless to do anything about them if they are against the wishes of the majority. (Sec. 9(a).)

III.

THE NATIONAL LABOR RELATIONS ACT CONSTITUTES A DELEGATION OF POWER REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

Section 9(b) fails to supply a legislative standard to guide the Board in determining what is "the unit appropriate for the purposes of collective bargaining" and in this particular constitutes an unauthorized delegation of legislative power. As hereinbefore pointed out, there is no standard for the Board's guidance, no limit to the exercise of its discretion.

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), this Court held unconstitutional Section 9(c) of the Recovery Act, which purported to authorize the President to prohibit the transportation in interstate commerce of petroleum produced or withdrawn from storage in excess of the amount permitted by state law. After reviewing cases in which an adequate legislative standard had been provided, the Court said, at p. 430:

> "Thus, in every case in which the question has been raised the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that Section 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

The sweeping delegation of legislative power in Section 9 (b) of the National Labor Relations Act is without precedent, just as this Court, in Schechter Poultry Corp. v. United States, *supra*, held that Section 3 of the Recovery Act, authorizing the President to establish Codes of Fair Competition, was without precedent, for the following reasons:

"It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, §3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in §1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered . . ."

Similarly the provision in Section 9 (b) authorizing the Board to determine "the unit appropriate for the purposes of collective bargaining" is a clearly insufficient standard which finds no support in previous decisions of this Court.

Section 7 of the Act places no restrictions on the purposes of the labor organizations which are given certain rights and benefits under other sections of the law.

Section 9(a) makes a majority of the employees "in a unit appropriate for such purposes" the "exclusive representatives of all the employees in such unit for the purposes of collective bargaining."

This has the same vice as that found in Part 3, Section 4 (g) of the Bituminous Coal Conservation Act of 1935, which delegated the power to fix maximum hours of labor and minimum wages to a part of the coal producers and miners. In declaring this delegation unconstitutional, this Court, in *Carter v. Carter Coal Company, supra*, made the following statement which is pertinent to Section 9 (a) of the Act here in issue:

"The effect, in respect of wages and hours, is to subject the dissentient minority, either producers or miners, or both, to the will of the stated majority, since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory pro-

visions of the Act to which we have referred. To 'accept', in these circumstances, is not to exercise a choice but to surrender to force.

"The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. *This is legislative delegation in its most obnoxious form;* for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of the others in the same business. . .

"And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court which foreclose the question." (Emphasis supplied.)

IV.

THE INVESTIGATORY POWERS VESTED IN THE BOARD ARE REPUGNANT TO THE FOURTH AMENDMENT TO THE CONSTITUTION.

Section 11 of the Act gives to the Board unlimited power to compel not only the production of books, records, correspondence, documents or other evidence "which, *in the opinion of the Board* are necessary and proper for the exercise of the powers vested in it" by Sections 9 and 10, but also the power to compel access for the purpose of examination and the right to copy any evidence "of any person being investigated or proceeded against that relates to any matter under investigation or in question." (Emphasis supplied.)

The only persons who can be investigated under the Act are employers. The effect of this provision is to subject an employer's affairs to impertinent scrutiny by a government agency at the request of those who claim to represent his employees and to make a public record of all of his affairs

in such a way as to subject him in turn to irreparable injury.

If there is any one principle imbedded in our jurisprudence it is that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated". That right is sacred.

The Fourth Amendment was inserted in the Constitution to protect the citizen from just such provisions as those of Section 11. It grew out of public resentment against the notorious writs of attachment and writs of assistance of colonial days; out of the struggle against arbitrary power in which our forefathers had been engaged for more than twenty years before the declaration of American independence.

Substantially similar enactments have often been condemned by this Court.

Boyd v. *United States*, 116 U. S. 616 (1886).
Federal Trade Commission v. *American Tobacco Company*, 264 U. S. 298 (1924).

See, also, *In re Pacific Railway Commission*, 32 Fed. 241 (C. C. N. D. Calif. 1887) (frequently referred to with approval).

Section 11, offensive as it is standing alone, becomes more repugnant when read in connection with that provision of Section 10(c) which relieves the Board of any requirement to adhere to the rules of evidence prevailing in courts of law or equity in its various proceedings.

The controversy now before this Court relates to an order of the Board calling upon The Associated Press to reinstate a newswriter who was discharged by the petitioner herein. Under the broad provisions of Section 11, it would be quite possible for the Board to demand access to the records, correspondence, interoffice memoranda, and other matters relating to the editorial policy of a newspaper. It must not

be forgotten that the organization which filed this complaint is seeking to embrace within its membership all persons employed in the editorial departments of newspapers, from office boy to editor-in-chief. It is not unreasonable to assume—if this Act be upheld and a controversy should arise between a labor organization which claims to represent a majority of the editorial employees of a newspaper and the publisher of that newspaper—that such an organization would request of the Board a sweeping inquiry into editorial policy and that the Board in turn would demand of the publisher all books, records, papers, correspondence and other material evidence relating to such policy.

The reasons why an editor determines upon a specific policy are not reasons for governmental inquiry and no power exists to compel the disclosure of those reasons.

Some organization claiming to represent the employees of a newspaper engaged in its advertising department might bring a case before the Board, and under the provisions of Section 11, the Board might attempt to require the publisher to give evidence as to why he accepted or rejected certain advertisements.

It is a well-known fact that many publishers have established rules with which all advertising copy must comply in order to maintain their newspapers upon a high standard of decency and integrity.[8]

Just as the publisher of a newspaper has the right to lay down his editorial policy, just as he has the right to accept or reject news according to his own judgment of its importance, so does he have the right to accept or reject advertising copy according to the standards of his publication as those standards are fixed by him.

None of these is a matter for government inquiry unless some violation of law occurs. As this Court has said, subsequent punishment, not previous censorship or regulation, is the rule to be followed.

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[8] See address of Arthur Hays Sulzberger, President and Publisher of the New York Times, before the Columbia Alumni Association, *Editor and Publisher*, January 9, 1937, pp. 3-4.

CONCLUSION

As has been stated heretofore, the fundamental question presented by this case, insofar as it affects the newspaper publishing business, is whether Congress can create or endow a legislative agency with power to control the various steps and operations essential to the gathering and the dissemination of information by the press; whether Congress can substitute its judgment or that of one of its agencies for the judgment of those who under our Constitution are responsible for the conduct of the business of the press.

As Mr. Madison said, in his Report on the Virginia Resolutions, the

> ". . . security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also."

This principle has been upheld in the Near case, the Grosjean case, and the De Jonge case by this Court.

It is respectfully submitted that under the provisions of the First and the Fifth Amendments, Congress has no power either to compel or to forbid collective bargaining; that it has no power to substitute its judgment or that of one of its agencies for the judgment of those who conduct the business of the press.

If a newspaper publisher desires to enter into contracts with his employees by the terms of which he restricts his right of selection to members of any particular organization, Congress is without power to interfere with him in his determination so to do.

Likewise Congress is without power to compel a newspaper publisher to enter into such an agreement.

Neither has Congress the power to say to a citizen of this country who desires to engage in newspaper work that as a condition precedent to such employment he must obtain membership in a labor organization approved by one of its agencies.

The sole question involved in this controversy is one of the power of Congress to authorize the National Labor Relations Board to do the thing which it has done—to require petitioner herein to retain in its employ a man whom it regards as no longer suited for such employment.

It is submitted no such power exists.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMICUS CURIAE.

By ELISHA HANSON,
Counsel for Amicus Curiae.

APPENDIX A

THE NATIONAL LABOR RELATIONS ACT

[PUBLIC—No. 198—74TH CONGRESS]

[49 Stat. 449; 29 U. S. C. A. §151 et seq.]

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends

to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or any-

one acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133[1] approved June 14, 1935.

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

[1] So in original.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

SEC. 4. (a) Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent

or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a

group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertin [1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any

[1] So in original.

other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing for the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all

the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evi-

dence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28 secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board

under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under

investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEC. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 16. This Act may be cited as the "National Labor Relations Act."

Approved, July 5, 1935.